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File 100-82 WT97-82
C. J. Garcia

EX-100-82 FILED

September 3, 1997

Mr. Jon C. Garcia
Director of Strategic Analysis
Federal Communications Commission
Office of Plans and Policy
1919 M Street, Room 822
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Bank of New York

Dear Jon:

First, let me thank you for the opportunity to participate in the task force meeting regarding the resolution of the C-block auction issue. As a Wall Street research analyst, covering investments in cable and telecommunications for many years, it is rewarding to see a government agency open itself up to the opinions of the marketplace in such a candid and earnest manner. It is of paramount importance that this type of dialogue continue, as a bridge between government and the marketplace. For policy decisions to be effective and work, supporting the flow of business, while looking out for the best interest of the people, they can not be made in a vacuum. I trust that the precedent made by this commission continues, even under new stewardship at the FCC.

Regarding the issues that were discussed at yesterday's meeting, please allow me to express my views. Integrity is the key word. Integrity is involved in these discussions on several levels. First there is the integrity of the auction process itself. It seems of utmost importance that the FCC no longer acts in a financing mode again. Being induced to play the role of investment banker not keeping with the role of protector and proponent of public policy.

Secondly, the integrity of business entities that win a license, no matter what area of the radio spectrum we are speaking about, has great implications going forward. For telecommunications in this country to be competitive and effective, it is paramount that only strategic and sound business players, who have rational operating plans and models, be allowed to own a piece of this precious commodity. This consideration ought to rise above any consideration that those who currently own the licenses be the ones that continue to own the license.

Speaking of competition, let us speak of competition not only on a wireless to wireless basis, but on a wireless to wireline basis. Let us look at the entire communications environment, as each subsection will eventually work in concert with each other. It seems apparent to me, that it is the PCS operators who will be the next CLECs, offering a truly competitive product vis-à-vis that offered by the twisted copper pair technology.

If this country is to properly prepare itself to be competitive on into the next century, in a global sense, offering businesses state of the art technology to support their operations, then surely we need to invest in alternative technologies, which will inevitably be the means of breaking up the local loop. This will only be accomplished by entrepreneurial, creative management teams who can amass credibility in terms of developing business plans, raising financing, building networks and implementing operational and marketing schemes, in competitive arenas. These are the types of business entities that ought to be rewarded the opportunity to bid on and win licenses.

Finally, let us look back at the auction process itself and once again we are confronted with the idea of integrity. If the FCC were to "do nothing", effectively forgiving the debt of those financially strapped bidders of C-block licenses, the implications would be far more reaching, affecting all investments made in this country. The reason why a free market economy works, is because there are rules that are upheld and enforced. One could rightfully question the generous financing package that was offered in the auction to begin with. But if we discover that irrational and destructive business practices are not discouraged, but are, in fact, "understood" and, worse yet, accepted, then there can be no assurance going forward that rational, sound business actions will be rewarded the marketplace, while irrational, chaotic behavior will be either ignored as merit-less, or penalized w

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attempted. Furthermore, it would be foolhearty to believe, under such a scenario, that there will be foreign companies willing to take the risk to invest in this country.

With regards to resolving the immediate issue at hand with this C-block situation, let's explore some possible ideas with the intent of resolution within the guiding goals currently at the FCC. As was outlined by Chairman Hundt, the first and foremost goal is to foster competition by getting the means to the individuals capable of building competitive systems in order to challenge incumbent strongholds. The public does deserve to have spectrum licenses in the hands of those who are most able to put the spectrum to greatest and best use. A solution must take into consideration the fact that current license holders may not fit the requirements implicitly dictated by this goal.

At the task force meeting it was implied that there where only two paths to pursue; "Do Nothing", reinstate the payment period in one month, with a 90 day grace period, and allow to happen what may. The second course was to "Do Something", i.e. the deferral of obligations. May I suggest a third, which effectively is a combination of the above two. For all practical purposes it would take until the April or May, 1998 time frame for a re-auction to be structured and executed. The FCC ought to set a date in June, 1998 for a re-auction. Insist that current license holders inform the FCC of their intentions on December 1st, 1997, whether they will continue to hold (and thus pay for) licenses, without any forgiveness on the debt, and with the intent to build out, or take advantage of an amnesty program by the FCC, thereby putting back their licenses, making them available for the re-auction. Payments would begin on or around February 1st, allowing for the ability to possibly obtain financial backing from foreign countries, under the recent WTO agreement.

The advantages are: 1) By offering an "amnesty" program to current license winners who can not afford to pay for the license (much less pay the \$30-40 per "POP" to build out the systems and the additional funding required to start operations until cash flow break even occurs), the FCC can assure that the licenses end up in the strongest hands and that the goal of competition is met. An amnesty program will avoid any inappropriate punitive role playing for the FCC, especially if current license holders are allowed to participate in the re-auction, albeit in different markets. An amnesty program also avoids unnecessary litigation procedures which will only tie up parts of the spectrum in the court process for years.

2) A re-auction, as opposed to a forgiveness of debt, protects the integrity of the auction process and the FCC's role as caretaker of this public asset, in particular, and the business operating environment in this country in general. This point can not be stressed enough. The implications of a debt forgiveness would affect the integrity of this country as a leader in free market practices.

3) A June re-auction effectively gives enough breathing room to all players, current licensees as well as potential new bidders. There will be approximately six months from the time current license holders announce their intentions, allowing enough time for new potential bidders to survey the properties and line up financing. It ought to be noted that the markets to be auctioned have already been evaluated once before. Furthermore, there will be an additional nine months to observe the operating results of PCS operators who are up and running, to judge how accurate business models correspond to actual results. Finally, if the original debacle in financing options occurred, as a few have suggested, because Wall Street walked away during a bear market in wireless stocks, there will have been effectively 18 months for a recovery to occur.

4) This procedure will have equitable implications for all who participated in the auction, as well as for those who pulled out of the bidding process, due to "uneconomic bidding". Lastly, it is clearly obvious that a "Chinese Menu" approach (allowing for options such as disaggregation), will not work, as it results in the cowing down to the individual self interests of certain companies who are attempting to hold the FCC hostage, using the threat of bankruptcy. Playing into this behavior only further erodes the integrity of the process. It is possible that a few bankruptcies are declared. However, a wave of such filings is unlikely. In a free market environment, such options are always available and ought to be for the system in total to work.

September 3, 1997

Understandably, this is not an easy issue to resolve, as the implications are many. However, a gentle but firm and timely approach by the FCC is most warranted. It is important to know for the workings of a free market to ensure, that the institutions of government have the strength to assure such workings. A laissez-faire approach may arguably be an attractive environment to operate in. However, it is not attractive, nor constructive to change the rules of behavior in the middle of the game.

Time to market is a key issue affecting competition in this industry. To allow the build-out of the C-block licensees to linger will only go to further enhance the position of the incumbent. *And let it be clear that the most entrenched incumbent in the area of personal communications is not other wireless operators, but is in fact the regional bell operating companies.* It would be a gross mistake to give these companies any further advantage then they have already entertained for decades.

Again, I thank you for allowing me to be part of the process. I hope that my comments will be seen as constructive and of assistance. If I can be of any further help, please feel free to contact me.

Sincerely,



Carol M. Cutler
Vice President
Bank of New York
1 Wall Street, FL 11S
New York, New York 10286
Voice: 212-635-8720
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cc: Chairman Reed Hundt

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MEMORANDUMFEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Federal Communications Commission
FROM: Roger Linquist
SUBJECT: Comments on "Full Price Buy-Out" Proposal
DATE: September 22, 1997

8144 Walnut Hill Lane

Suite 600

Dallas, Texas 75231

(214) 265-2550

Fax (214) 265-2570

The "full price buy-out" proposal outlined in the Tauzin-Markey letter of September 16, 1997, could be considered by the General Wireless Board of Directors on no less attractive terms than the following:

1. Full credit for licensees' existing down payment deposit (100%).
2. Net present value calculated on the "net cash bid" prices for licensees on a BTA by BTA basis.
3. The discount rate must be at least 15%.
4. "New money" could be used, together with the down payment, within at least 180 days from the date of the final order.
5. Licensees should not be restricted in any manner from participating in a re-auction for any licenses, including their own in order to achieve sufficient scale for raising money for operations.

Anything that effectively ~~increases~~ net present value of the net cash bid, such as reducing the discount rate (which should be the industry's cost of debt financing) or the amount of down payment available to the licensees (other than 100 percent), would not be an alternative to bankruptcy.

The above proposal, as it stands, can only be viewed as marginal in that the fundamental issue of valuation in current financial markets is not addressed.

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OFFICE OF THE CHAIRMAN

NOKIA

1850 K St. NW, Suite 1175, Washington, D.C. 20006
PH: 202.887.0145 FX: 202.887.0432

September 16, 1997

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SEP 24 1997

The Honorable Reed Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Mr. Chairman:

Nokia supports solutions to the problems confronting C Block licensees which would result in the maximum amount of spectrum coming back into the marketplace for reauction within a reasonably brief period of time without involvement of the bankruptcy courts. At the same time, Nokia realizes it is critically important that the integrity of the FCC's auction rules be preserved and particularly that "restructuring" not reward those companies which engaged in irrational and speculative bidding to obtain their licenses. Any potential rule change that would materially postpone C block debt payments merely delays the inevitable bankruptcies.

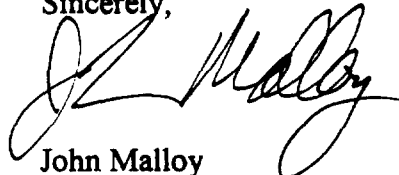
Accordingly, Nokia would support an amnesty/disaggregation election. Licensees opting for "amnesty" would be required to relinquish all of their C Block licenses in return for the eradication of their C Block debt obligations and would have the opportunity to rebid on any of these licenses in a reauction. Alternatively, a C Block licensee could elect to retain 15 MHz of spectrum on a license by license basis, return the other 15 MHz for reauction and receive a proportionate reduction in its obligations to the government. A licensee choosing the diaaggregation option would be ineligible to bid in the reauction of the returned 15 MHz spectrum.

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The Honorable Reed Hundt
September 1997
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The approach described above appears best calculated to vindicate multiple public policy objectives: maximizing the "salvage" value of the C Block spectrum for the government; creating more realistic competitive opportunities for small business to participate in wireless service offerings; and avoiding a windfall for C Block licensees whose conduct was, in fact, injurious to the auction process and the many companies which participated in good faith in the C Block auction.

Sincerely,

A handwritten signature in black ink, appearing to read "John Malloy", written over a horizontal line.

John Malloy
Vice President

cc: The Honorable Susan Ness
The Honorable Rachelle Chong
The Honorable James Quello

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Jon Garcia
Director of Strategic Analysis
Federal Communications Commission
1919 M Street, Room 822
Washington, DC 20554

Dear Jon:

The roundtable meeting last week between the FCC and the investment community concerning the C block financing dilemma was an excellent idea. It is important that key policy decisions such as this be made in an environment that encourages open dialogue instead of an isolated vacuum. I hope that as the new regime comes in at the FCC that this type of meeting will continue as standard operating procedure.

In regards to the current C block financing problem I have attached the latest issue of the Raymond James Telecom Weekly which discusses this issue in detail and summarized our key points below:

1. Most of the C block financing problems have been created by the bidders themselves.
2. It is essential that no changes be made to C block financing terms in the middle of the game.
3. Even if C block licensees fail, the FCC has succeeded in dramatically increasing wireless competition.
4. C block spectrum will become important as wireless services begin to compete with wireline services.
5. If the FCC feels that there is a need to proactively help small businesses then:
 - Make that decision quickly and focus on companies that are truly "small businesses".
 - Offer companies the opportunity to voluntarily return their licenses.
 - Start a re-auction of the returned licenses by second quarter 1998.
 - Allow companies that have already launched C block service to participate in a re-auction.
 - Require 100% cash on the barrel payment for re-auctioned licenses.
 - Pre-qualify all bidders concerning access to financing for network build-out and operating losses.
 - Limit the amount of re-auctioned non-overlapping Pops that a small business can own.

Regardless of whether the FCC decides to proactively help small businesses or do nothing at all it should always maintain its credibility; foster competition; and act fairly and quickly because time is of the essence. We believe that these simple truths and the very fabric of our economy require the FCC to make no changes to the terms of the C block financing in the middle of the game.

Good luck and thanks again for including me in the roundtable discussion. If I can be of any further assistance please contact me at 813-573-3800 x 2567.

Sincerely,

Richard Prentiss
Telecommunications Services Analyst

Enclosures

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OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

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J. H. H. H.

WT 97-82

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September 8, 1997

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SEP 24 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW Suite 814
Washington, DC 20554

RE: In re Broadband PCS C and F Block Restructuring,
WT Dkt. No. 97-82 & DA 97-697

Dear Mr. Chairman:

The Office of Advocacy commends the Federal Communications Commission's ("FCC or Commission") efforts in addressing the concerns of licensees of the Personal Communications Services (PCS) C block. Advocacy recognizes that a "one-size fits all" approach to resolving these concerns would not be reasonable given the range of issues before the Commission and the different needs of C block licensees.¹ We have consulted with finance, investment, and entrepreneurship experts in other divisions of the U.S. Small Business Administration, in addition to talking to PCS C block licensees and investment companies. These comments are a result of these efforts.

Advocacy agrees that it is important to preserve the integrity of the FCC's auction process, particularly for continued small business participation.² However, we are most concerned about the ability of small businesses not only to compete against larger entities and incumbents in the auction process on a equal playing field, but also compete in the telecommunications marketplace as viable service providers. Small businesses need equitable rules and decisions from local, state, and federal regulatory bodies; rules that eliminate market entry barriers in this still monopolistic industry. Providing a level playing field for small businesses is in the public interest, pursuant to the Commission's statutory mandate under the Communications Act of 1934, as amended by the Telecommunications Act of 1996,³ and the Small Business Regulatory Enforcement Fairness Act of 1996.⁴

¹ Major issues facing C block licensees may include difficulty in making installment payments, difficulty in accessing capital for construction of systems and marketing, difficulty in executing business plans given uncertainty with the status of other licensees and continued obstruction from cellular incumbents and A and B block licensees. See e.g., Letter from Leonard S. Sawicki, MCI Telecommunications Corporation, to William F. Caton, Secretary, FCC (May 1, 1997); Letter from James H. Barker and Michael S. Wroblewski, Latham & Watkins, representing Fortunet, to William F. Caton, Secretary, FCC (May 9, 1997).

² Letter from John S. McCain, Chairman, U.S. Senate Committee on Commerce, Science, and Transportation, to Reed E. Hundt, Chairman, FCC 3 (Aug. 19, 1997).

³ 47 U.S.C. §§ 309(j), 257.

⁴ 15 U.S.C. §§ 601 *et seq.* (Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996)).

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I. THE OFFICE OF ADVOCACY RECOMMENDS THREE BASIC PRINCIPLES FOR REACHING A FINAL DECISION

The Commission has a difficult task in resolving many complex issues and balancing the widely divergent interests of the parties. Advocacy asks that the Commission consider the following principles in reaching a final decision. First, the promotion of competition and bringing rapid new services to the public should be paramount over raising revenue or preserving auction payments to the U.S. Treasury.⁵ Second, the preservation of small business involvement is essential to fulfilling the promises of the Telecommunications Act of 1996 that there will be effective competition, innovative new services and products to consumers, universal service to niche and under-served markets, and the creation of new jobs.⁶ Finally, the characteristics of small telecommunications businesses are unique.⁷ Therefore, the impact of small regulatory changes and marketplace obstacles faced by small business can result in a significant economic impact which will ultimately determine a small businesses' success.

Given these principles, the Office of Advocacy recommends the following:

1. Short-term deferral in the submission of installment payments in combination with an extension of the five-year construction deadline or alternatively, a long-term deferral with no change in the construction deadline;
2. Modification of installment payment schedule from a quarterly to annually;
3. Option to turn in license, in whole or in part, under an amnesty program; and
4. Preservation of exclusive small business participation in a C block re-auction, if a re-auction is necessary.

⁵ This principle is consistent with the mandate set forth in the Communications Act of 1934 that the Commission "not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from . . . competitive bidding under this subsection." 47 U.S.C. § 309(j)(7)(A).

⁶ In high technology and communications industries, the rate of job creation is expected to increase driven by the creation of new small business entrants. From 1992 to 1996, the number of firms with 1-4 employees increased 87%; firms with 5-19 employees increased 26.2%; and firms with 20-49 employees increased 14.8%. Cognectics, Inc., Table: Gross Flows of Jobs by 1992 Firm Size, Transp., Comm., Util. NEC, Section 1, (draft report on contract to the U.S. Small Business Administration). Small businesses also hire the bulk of workers terminated due to corporate downsizing. Ralph Reiland, *Small Business, Big Government & American Prosperity*, The American Enterprise, July/Aug 1997, at 46 (citing Robert Reich, then a Harvard University Professor). "Small Businesses [are] now widely regarded as the principal generator of net new employment in the United States." William J. Dennis Jr., et al., *Small Business Job Creation: The Findings and Their Critics*, Business Economics, July 1994, at 23.

⁷ *In re* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, GN Dkt. No. 96-113, FCC 97-164, adopted and released May 8, 1997, at paras. 29-34 [Section 257 Report].

II. A REDUCTION OF PRINCIPAL BID AMOUNTS IS NOT REASONABLE GIVEN THE DIFFICULTY OF ASSESSING THE APPROPRIATE MARKETPLACE VALUE

The Office of Advocacy does not support a reduction of the principal bid amounts for C Block. Not all licensees over-bid or are facing bankruptcy. Although a haircut reduction in principal would provide immediate relief to those licensees whose bids were, arguably, excessive, such a drastic move is not reasonable given the difficulty in determining what the appropriate market value of the licenses should be. The standard value measurements used to compare bids; "dollars per pop" and "dollars per MHz-pop," do not take into account the multiple tangible and intangible factors that influence bid activity and bid amounts.⁸ One must also factor geography, the size of the license area (MTA's v BTAs), demographics, spectrum allocation (30 MHz v 10 MHz), complexity of build-out, interest rates, cost of capital, etc.⁹ In the absence of a detailed analysis of bidder characteristics, the actual bidding process, round activity, and the financial environment and marketplace circumstances during each of the auctions, including a regression analysis to isolate individual factors, Advocacy does not believe that it can be determined with certainty that the adjusted marketplace value of C block should be based on either A and B or D-F bid amounts. A reduction in principal would also seriously undermine the integrity of the auction as well as set a dangerous precedent for small business participation in future auctions.

Advocacy is not convinced that C block was not the true marketplace at work given the 750% increase of the number of bidders compared to A and B blocks (30 bidders in A and B v. 255 bidders in C) and the emergence of new players to the field. It could also be argued that the bidding in A and B blocks was controlled or stifled given the involvement of incumbents with a desire to protect their own cellular or wireline interests and therefore, diminishing the entry of competitors in their markets. The absence of such traditional telecommunications providers in C block could have facilitated the vigorous competition not present in A and B - resulting in higher bids for C. Furthermore, a 40% reduction in the number of bidders in D-F (estimated 154) compared to C block may also be a factor in setting the lower *average* bids for D-F - fewer competitors reduces competition resulting in lower bids. Even though D-F prices were on the average less than C, several BTAs in D and E blocks *exceeded* C block bids in the amount bid and price per pop - for less spectrum.¹⁰ Does this mean that C block bids, in those particular markets, were too low or, alternatively, that the D and E bids were excessive?¹¹ What adjustments would be made for individual market anomalies? How would an anomaly be defined?

A re-auction should not be heralded as the ideal solution but as an option of last resort. A re-auction will not determine the "true market value" of C block. A re-auction will only reflect a deflated value of PCS spectrum based on the totality of the circumstances at the time of the re-auction which would include the current volatile financial market for wireless investments and the influence of the controversies surrounding C block. Even an expedited auction means that service to the public would be further delayed given the time needed for the Commission to issue new rules and procedures; adequate lead-time for potential small business bidders to devise business plans and secure financial support; completion of the actual bidding; the assignment of licenses; plus time for the construction of the systems.

⁸ BIA Consulting, Inc., Personal Communications Services: In the Wake of D,E, and F-Block Auctions 6 (Mar. 1997) [BIA Report].

⁹ See *id.*

¹⁰ For example, the winning bid for Columbus, GA (BTA 92) for D and E blocks were \$16,635,000 and \$17,470,366, respectively - exceeding the C block winning bid of \$5,265,000. The average price per pop in C block is \$14.59 compared to \$46.09 for D block and \$48.40 for E block. FCC PCS Auction Results and BIA Report at Appendix 4 (BTA population figures are from the BIA Report).

¹¹ BIA reports that for the 20 least populous MTAs, the total bids for D-F blocks are greater than the average of A-C blocks. BIA Report at 6. The reverse is true for the 20 most populous MTAs. *Id.*

III. THE COMMISSION'S IMPOSITION OF A SUSPENSION ON THE ENTIRE BLOCK HAS HINDERED THE ABILITY OF LICENSEES TO PERFORM THEIR CONTRACTUAL OBLIGATIONS

The Office of Advocacy disagrees with the assertion that a blanket deferral of installment payments would be a "windfall" to some licensees.¹² Advocacy is of the opinion that, rather than creating a windfall, the FCC's suspension of installment payments,¹³ *inter alia*, has triggered market forces that have unexpectedly hindered, delayed and prevented licensees from meeting their construction of service requirements, even for those licensees that are not in financial distress.

The license agreement between the FCC and C block winning bidders is essentially a contract.¹⁴ Therefore, the FCC operates not only as regulator and banker/debt-collector, but also serves in the capacity of government-as-contractor. As a matter of law, there is an implied condition in any contract that neither party will do anything that will "hinder, delay, or prevent performance by the other party" in the absence of a right reserved or express language to the contrary.¹⁵ The express terms of the FCC's security agreement do not enable the Commission to alter or modify the terms of this contract unilaterally. In fact, the security agreement states that "[n]one of the terms or provisions . . . may be waived, altered, modified or amended *except by an instrument* in writing, duly executed by the Commission."¹⁶ The Wireless Telecommunications Bureau's *Order* imposing the suspension is not an instrument as established in this paragraph.¹⁷ Even if the *Order* were to be construed as an "instrument," contract law would not give the Bureau under delegated authority, nor the Commission authority to change the terms of the contract materially without mutual consideration and assent by the licensee.¹⁸ The unilateral suspension of payments is indeed a material change.

This suspension interjected even more uncertainty into this proceeding which directly affects the ability of a small business licensee to secure and keep investors and partners, execute business plans and construct their systems. The Bureau issued the suspension with noble intentions and as a means to help prevent future bankruptcies or defaults. However, the unilateral suspension of installment payments to a date uncertain, has in effect, put some licensees in a worse position than they were in prior to the suspension. The suspension has created a misperception that all C block licensees are in trouble causing

¹² David Kaut, *Hundt: We Should Do Now What Eventually Must Be Done to Correct C-Block Bid Levels*, BNA, Aug. 26, 1997 at C-4.

¹³ *In re Matter of Installment Payments for PCS Licenses*, *Order*, DA 97-649 (released Mar. 31, 1997).

¹⁴ In consideration for receiving a license(s) issued by the FCC as a representative of the United States, winning bidders in C block have executed Security Agreements and Installment Payment Plan Notes that set forth the terms and conditions of the payment of a license pursuant to 47 C.F.R. §§ 24.711, 1.2110.

¹⁵ *George A. Fuller Co. v. United States*, 69 F. Supp. 409, 411 (1947); *Allied Contractors v. United States*, 124 F. Supp. 366 (1954); *Dale Construction Co. v. The United States, Seaboard Surety Company*, 168 Ct. Cl. 692 (1964).

¹⁶ Security Agreement, Broadband Personal Communications Service, C Block, Auction Event No. 5, Para. 10.

¹⁷ Secured Transactions; Sales of Accounts and Chattel Paper, Article 9 of the Uniform Commercial Code defines "instrument" as a negotiable instrument (as defined in Section 3-104), or a certificated security (as defined in Sec. 8-102.) The definition of "instrument" does not include a regulatory decision or order.

¹⁸ The FCC is "bound by contractual obligations just as any private party, and principles of general contract law are equally applicable to government contracts unless congress enacts special standards governing the contract." *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947); *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2464-65 (1996).

further uncertainty about the viability of C block licensees to compete. This unanticipated stigma on C block as a whole has inhibited licensees from performing their contractual obligations to construct their systems and thus, has increased the cost of doing business considerably.¹⁹

Many of the suspension-induced hardships were not known until recently. For example, vendors, and suppliers, are now requiring additional documentation and engineering studies that detail specific cell site locations as a prerequisite for engaging in preliminary or continued discussions.²⁰ Prior to the suspension, there was less scrutiny by third parties and such detailed documentation was not needed until the later stages of negotiations or upon reaching a final agreement.²¹ This conservative approach is understandable since vendors and suppliers may themselves be small businesses and need some assurance of a C block licensee's viability given the uncertainty created by the suspension. There are thousands of small business vendors, suppliers, contractors, engineering, and marketing firms across the country who have not had the opportunity to finalize service contracts or commence work for C block licensees.²²

Substantial costs and other obstacles have hindered the ability of C block licensees to comply with these requests for detailed documentation. Unlike larger licensees that have in-house engineering departments and better access to capital, a C Block licensee must prematurely expend time and money to complete the due diligence necessary to hire a qualified RF engineer and contractor. In particular, those licensees that submitted the March 31, 1997 installment payment, without knowledge of the suspension imposed on the same date, have not had the ability to utilize those funds on deposit with the U.S. Treasury.²³ The timely completion of engineering plans is further complicated by local and state moratoriums or regulations restricting the approval of cell/tower sites.²⁴ There is also continued difficulty faced by C block licensees in acquiring information regarding microwave relocation from incumbent A and B block licensees.²⁵ Each of these factors are essential to the success of new entrants and yet the Commission has not yet resolved these market entry barriers.

¹⁹ See e.g., Letter from Rhonda McKenzie, President/ CEO, McKenzie Telecommunications Group, to John S. McCain, U.S. Senate, (Aug. 13, 1997) [McKenzie Letter].

²⁰ Telephone statement of Mateo Camirillo, Chairman, Integrated Communications Group Corp., Sept. 4, 1997, to the Office of Advocacy, U.S. Small Business Administration [Camirillo Statement]. Mr. Camirillo is an experienced broadcaster and is very familiar with engineering specifications and requirements. Prior to the suspension many C block licensees were courted by suppliers and vendors and were in active negotiations for the construction of their systems. Today, negotiations and contracts have been put on hold. McKenzie Letter; see also Telephone statement of Rhonda McKenzie, to the Office of Advocacy, Aug. 14, 1997.

²¹ *Id.*

²² See e.g., Letter from Rhonda McKenzie, President/ CEO, McKenzie Telecommunications Group, to William F. Caton, Secretary, FCC (June 20, 1997).

²³ Letter from Comtel PCS Mainstreet Limited Partnership, to Regina Dorsey, Chief Billings and Collection Branch, OMD, FCC (Apr. 4, 1997).

²⁴ A proceeding to address tower approval issues is pending before the Commission. *In re Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332 (c)(7)(B)(v) of the Communications Act of 1934, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Dkt. No. 97-192, ET Dkt. No. 93-62, RM-8577, FCC-97-303, released and adopted Aug. 25, 1997.

²⁵ Camirillo Statement.

The Office of Advocacy recommends either the grant of a short-term deferral in combination with an extension of the five year construction deadline or a long-term deferral without an extension that would serve as compensation for the harm caused by the FCC's unilateral suspension of installment payments. Although a deferral of three or more years would provide C block licensees with a better opportunity to invest capital to expedite the construction of their systems, an extended deferral period is more likely to induce litigation - causing further delay and uncertainty.

The five-year construction deadline clock for C Block has continued to run during the suspension.²⁶ Although each C Block licensee has an incentive to build-out as soon as possible in order to bring their systems to service and start to receive a return in their investment, many of the obstacles that have hindered construction have not been of their own making. A short-term deferral alone does not adequately provide enough breathing room given the inability to contract for construction services. Conversely, a long-term deferral would enable a licensee to invest heavily in construction to make up for lost time - therefore, a construction deadline extension would not be necessary.²⁷

There is a critical need to let the financial market settle down and provide licensees with an opportunity to educate investors about "the auction process, the technology, and the business case."²⁸ Licensees also need the lead-time to regroup or modify their business plans based on any changes in their own licenses or the license status of others as a result of the Commission's final decision on restructuring, i.e., creation of an amnesty or a disaggregation program. Unlike larger and more established entities, small businesses have fewer resources and staff to execute such changes immediately.

To be truly effective, a deferral period must commence *after* the Commission has lifted the cloud of regulatory uncertainty. This elimination of uncertainty includes setting forth a final order that establishes the appropriate interest rate, and firm policy that eliminates market entry barriers on local and state tower siting restrictions. These are "impediments to entry within the Commission's jurisdiction that justify regulatory intervention."²⁹ Resolution of these issues will in turn affect the financial markets. The start of the deferral period should not be calculated from March 31, 1997, the effective date of the stay. Such a calculation would be unfair and illusory. For those licensees that were not timely informed that a suspension had been imposed and paid their quarterly installment payments on or before March 31,³⁰ they should be refunded their installment payments *with interest*. They should be no worse off than those licensees that did not submit their March installment payments who have benefited from the accruing interest income on funds in their control.

²⁶ 47 CFR § 24.203(a).

²⁷ See Comments of National Association of PCS Entrepreneurs, Position Paper: Financial Restructuring of PCS Entrepreneurs Blocks (C&F) License Payments, May 1997.

²⁸ Letter from Steven R. Bradley, Vice President, Integrated Communications Group Corp., to S. Jenell Trigg, Office of Advocacy 2 (Sept. 1, 1997).

²⁹ Section 257 Report, para. 16.

³⁰ See e.g., Letter from Julia F. Kogan, representing Americall International LLC, to Linda King Friedman, Chief, Financial Operation Division, OMD, FCC (Apr. 2, 1997).

VI. LICENSEES IN OTHER BANDS AND SERVICES ARE NOT SIMILARLY SITUATED TO C AND F BLOCK THEREFORE, APPLICATION OF MEASURES TO ASSIST C AND F BLOCK SMALL BUSINESSES ARE NOT SUBJECT TO REGULATORY PARITY

The Commission's adoption of narrowly-tailored measures to provide relief for C and F block does not set a precedent for similar measures to be received for licensees in other bands or services. Proponents of regulatory parity, unless those proponents are defined as small businesses *and* have been subjected to similar government action that has directly hindered or delayed the performance of their contractual agreements, are not entitled to equal treatment.³¹ No other class of licensees have been subjected to the number of delays and degree of uncertainty that C and F block participants have had to endure - commencing from 1995 to present.³²

Section 332(c) of the Communication Act of 1934, 47 U.S.C. 332(c), which requires regulatory parity in the Commission's regulation of equivalent mobile services is not applicable in this matter. This provision "ensure[s] that all carriers providing such services [commercial mobile] are treated as common carriers"³³ The regulatory status of PCS and other wireless services as common carriers are not at issue here.

V. RECOMMENDATIONS FOR RE-AUCTION PROCEDURES

It is critical that the Commission take all necessary regulatory steps first to stabilize the value of C block prior to the imposition of a re-auction. Not until investors can properly evaluate the worth of a C block portfolio, will the licensee be able to make an informed decision whether to retain or turn in the license.

³¹ We distinguish any relief provided by the Commission for Interactive Video and Data Services (IVDS) from C Block. The Bureau's suspension of installment payments for IVDS did not operate to hinder, delay, nor prevent the performance of IVDS licensees' contractual obligations. *See e.g.*, *In re Interactive Video and Data Service Licenses, Order*, 11 FCC 3031 (1995). Quite the contrary. The Petitioners for the stay requested relief because the Commission had not acted on their substantive requests. *Id.* para. 1. Moreover, in the absence of new technology required to develop the IVDS service, there were few licensees, if any, that were in active negotiations for the construction of their systems with vendors and suppliers. Unlike C block, IVDS licensees also were not facing a considerable head start from larger and better capitalized competitors.

³² *See e.g.*, Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, §2, 109 Stat. 93 (1995) (Congressional elimination of tax certificates during critical financing stage); *In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order*, 10 FCC 136, paras. 3-4 (1995) (delays due to the Telephone Electronic Corp. judicial stay and Supreme Court's release of the *Adarand Constructors Inc., v. Pena* decision.). The R&O eliminated race and gender-based bidding incentives in response to the Supreme Court's decision in *Adarand*, 115 S. Ct. 2097 (1995). Two additional court-ordered stays were to delay further the commencement of the C block auction, affecting the economic viability of C and F block licensees. Antoinette Cook Bush and Marc S. Martin, *The FCC's Minority Ownership Policies From Broadcasting to PCS*, 48 Fed. Comm. L.J. 423, 433 (1996).

³³ H.R. Rep. No. 103-111, at 259 (1993).

The Honorable Reed E. Hundt
September 8, 1997
Page Eight

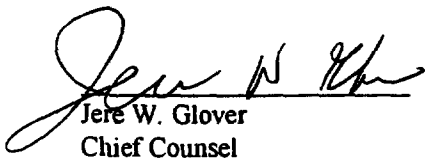
If the Commission opens up bidder eligibility in a C block re-auction to non-small businesses, the elimination of installment payments would not be acceptable. The Office of Advocacy, however, would not take issue with the elimination of installment payments if the recovered licenses were to be auctioned to small businesses exclusively.³⁴ Eligibility to participate in the re-auction should not be restricted to only new bidders nor preclude C block licensees that opted to return a license(s) from bidding. First, this would dramatically reduce the bidder pool and stifle potential competition. Second, such a restriction would foreclose the ability of a licensee to bid based on strategic decisions, (e.g., to acquire more contiguous BTAs and turn in non-contiguous BTAs) and not for the purpose of reducing debt. If necessary, a restriction that would prohibit a licensee from bidding on the same license returned may resolve the issue that it is unfair to allow a licensee who has purportedly over bid to participate in a re-auction and lower its current obligations.

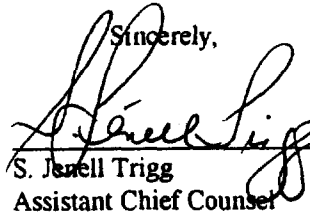
VI. CONCLUSION

For these reasons, we reiterate our recommendations: 1) a short-term deferral in the submission of installment payments in combination with an extension of the five-year construction deadline or alternatively, a long-term deferral with no change in the construction deadline; 2) modification of installment payment schedule from a quarterly to annually; 3) option to turn in license(s), in whole or in part, under an amnesty program; and 4) preservation of exclusive small business participation in a C block re-auction, if a re-auction is necessary.

Whatever steps the Commission takes - each step must be executed with finality. It is important to send a clear and unequivocal message to the industry and financial markets that there will be no further changes in the rules for C and F Block. As demonstrated by the current circumstances, continued uncertainty is the death kneel for small businesses.

The Office of Advocacy appreciates the Commission's consideration of these views.


Jere W. Glover
Chief Counsel

Sincerely,

S. Jenell Trigg
Assistant Chief Counsel
Telecommunications

The Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Ste. 7800
Washington, D.C. 20416
(202) 205-6533

cc: The Honorable James Quello
The Honorable Susan Ness
The Honorable Rachelle B. Chong
Mr. William E. Kennard
Mr. Daniel Phythyon
Ms. Catherine J.K. Sandoval

³⁴ Small businesses would be defined by the FCC and subject to the advance approval of the Administrator, U.S. Small Business Administration. 15 U.S.C. § 632(a)(2)(C).

WT 97-82

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MFRI Inc.

SEP 24 1997

June 20, 1997

The Honorable Arlen Specter
United States Senate
711 Hart Office Building
Washington, DC 20510

Dear Senator Specter:

Post-It® Fax Note 7671		Date 6/20/97	Page 5
To THE HONORABLE		From DAVID FERNALD	
Co./Dept. ARLEN SPECTER		Co. MFRI INC	
Phone *		Phone * 717-476-3016	
Fax * 202-228-1229		Fax * 717-476-8944	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MFRI Inc. is a small entrepreneurial Pennsylvania corporation that was active in the recently completed Federal Communication Commission's (FCC) Personal Communications Services (PCS) auctions. We are a locally owned and operated company that was the successful bidder for three C & F Block licenses in Northeastern Pennsylvania, including Monroe; Schuylkill; Northumberland; Montour; Union; and Snyder counties. We hope to be able to provide 30 jobs within the next year to residents of Northeastern Pennsylvania and provide consumers with an additional choice for cost effective wireless communications.

The FCC is holding a public meeting on 30 June 1997 to address Broadband PCS C and F Block installment payment issues. As a small entrepreneurial company MFRI supports the National Association of PCS Entrepreneurs (NAPE) position (enclosed) vis-a-vis the proposal to "restructure the C&F Block financial obligations for license payments by suspending all payments due until the end of the fifth year of license (coupled with strict enforcement of network build-out requirements); with the balance of principal and interest paid over the remaining five years of license" that was presented to the FCC on June 11th. MFRI hopes that you can provide support for NAPE's position.

The NAPE position is a reasonable method for keeping the integrity of the bidding results while allowing entrepreneurs, like us, to conserve capital for use in building and operating PCS networks. MFRI is committed to bringing the latest digital wireless technology to the non-metropolitan areas of Northeastern Pennsylvania that are not of much interest to the larger providers. Restructuring the C and F Block payment schedule will allow us to use our available capital to build a better and more complete PCS network in Northeastern Pennsylvania. Our success in building a high quality network is important to us and our business plan. The results of which will be the provision of high quality digital wireless communications in Northeastern Pennsylvania thereby providing consumers with the increased choices that they deserve.

We hope you will join us in supporting the NAPE proposal. If you have any questions or require more information about how our new technology will benefit the residents of the State I will be happy to discuss the matter with you.

Sincerely,

David G. Fernald, Jr.
President

Enclosure
as

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ROBERTS-ROBERTS & ASSOCIATES

POSITION PAPER

Financial Restructuring of PCS Entrepreneurs Blocks (C&F) License Payments
May, 1997

The National Association of PCS Entrepreneurs [NAPE] proposes that the Federal Communications Commission [FCC] reconsider the current schedule by which licensees for C and F Block Personal Communication Services [PCS] are expected to pay for their PCS licenses. NAPE was formed in May of 1996 for the explicit purpose of representing the common interests of all C&F Block PCS licensees. This position paper represents one of the most common interests currently existing among C&F Block licensees.

Background: The C&F PCS Blocks were set-aside by the FCC for *Entrepreneurs* -- primarily minority and women-owned businesses, small businesses, and rural telephone companies. The purpose of this preference was to ensure opportunity for such businesses to enter the emerging wireless communications market, create new jobs, and foster competition that will benefit of consumers. The annual gross revenue limits used to qualify entrants for the "Entrepreneurs Block" served to preserve the preference for small businesses and also ensured that winning bidders would not have substantial amounts of cash readily available to finance the build out and marketing of their new wireless services. Delays in starting the C&F Block Auction allowed the larger service providers (primarily RBOCs and Long Distance Carriers) who had secured PCS licenses in an earlier auction, to gain a competitive edge on the C&F Block licensees. This competitive edge was most clearly demonstrated in the lack of vendor financing available to C&F Block licensees (many vendors had "maxed-out" their financing capabilities with the larger A&B Block carriers who acquired their licenses much earlier) and the lack of interest in C&F Block carriers among the capital markets (they, too, had "maxed-out" their risk taking with the larger carriers). This, coupled with recent increases in interest rates have all but dried up the high yield market for C&F Block licensees. The net result, one year after the C&F Block Auction, is that many licensees must finance their system build out with internal resources. Although the FCC's original commitment to finance C&F Block license payment over the ten year term of the license appeared benevolent and supportive initially, the financial burden posed by the current repayment schedule has become an albatross around the necks of the C&F Blocks. The current schedule for C Block licensees¹ requires interest only payments be submitted quarterly (although payment was suspended until the end of the year) for the first six years of license, interest plus principal payments during years seven through ten. This financial obligation to the agency of license substantially inhibits C&F Block licensees' ability to negotiate competitive vendor financing terms and generate interest among potential investors. They are forced to choose between using scarce capital to

¹ F Block licensees have a different payment schedule ranging from interest only for the first two years after license issue to principal and interest over ten years.

ROBERTS-ROBERTS & ASSOCIATES

pay down license debt, or aggressively build-out their markets and they can't do both.

Position: In consideration of these circumstances, and to ensure that the FCC and the American public realize the competition envisioned by those who created the entrepreneurs block, NAPE proposes that the FCC restructure the C&F Block financial obligation for license payment by suspending all payments due until the end of the fifth year of license (coupled with strict enforcement of network build out requirements), with the balance of principal and interest paid over the remaining five years of license. Such restructuring would serve the best interests of the government, the C&F Block licensees, and the American consumer.

The FCC would benefit by avoiding the possibility that it would: [a] force defaults by demanding all cash available to C&F Block licensees; [b] be compelled to re-auction defaulted licenses, risking the possibility that final bids in a re-auction would be far, far less than those achieved during the initial C&F Block auctions; [c] be responsible for collapse of the competitive market envisioned when the C&F Blocks were created.

The C&F Block licensees would benefit by: [a] being given the opportunity to concentrate their resources on build out and marketing of their new wireless services, [b] being able to develop a stable cash flow before payments to the FCC become due and payable; [c] having the real opportunity to serve the purpose for which they were created - a competitive market.

The American consumer would benefit by: [a] competitive wireless communication pricing that would evolve as a result of a viable entrepreneurial segment among the carriers; [b] new jobs created by these entrepreneurs whose current staffing (as opposed to the A&B Block licensees) would not be sufficient, thus requiring C&F Block licensees to increase employment; [c] innovations in service that would be spearheaded by entrepreneurs compelled to compete against the large carriers by offering new, or more comprehensive, or more community specific services.

Submitted by:
Michael V. Roberts, Chairman
National Association of PCS Entrepreneurs
1408 No. Kingshighway Suite 300
St. Louis MO 63113
[314] 367-4600

WT 97-82

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United States Senate

WASHINGTON, DC 20510-3802

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Ms. Karen Kornbluh
Director
Office of Legislative and Intergovernmental Affairs
Federal Communications Commission
Room 808
1919 M Street, NW
Washington, DC 20554

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SEP 24 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Kornbluh:

I am forwarding to you the letter of my constituent, Mr. David G. Fernald, Jr., President of MFRI Inc., a wireless communications corporation located in East Stroudsburg, Pennsylvania.

Mr. Fernald contacted me to express his support for a proposal to restructure the C&F Block financial obligations for license payments. Specifically, Mr. Fernald views this proposal as a reasonable method for keeping the integrity of the bidding results while allowing businesses to conserve capital to improve technology and services.

Please grant Mr. Fernald's concerns all due consideration and allow me to thank you in advance for your responsiveness. I appreciate your responding directly to Mr. Fernald and forwarding a copy of that response to my attention.

Thank you for your attention to this matter.

Sincerely,


Arlen Specter

AS/ss/wm
Enclosure

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